The Distant Ships of Liberty: Why Criminology Needs to Take Seriously International Human Rights Laws that Apply to Persons with Disabilities

Michael L. Perlin
Alison Lynch
Kelly Frailing
Ashley Juneau

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“THE DISTANT SHIPS OF LIBERTY”: WHY CRIMINOLOGY NEEDS TO TAKE SERIOUSLY INTERNATIONAL HUMAN RIGHTS LAWS THAT APPLY TO PERSONS WITH DISABILITIES+

MICHAEL L. PERLIN,* ALISON J. LYNCH,** KELLY FRAILING, PH.D.*** & ASHLEY JUNEAU****

ABSTRACT

Persons institutionalized in forensic psychiatric facilities have been hidden from the public view for decades—physically, socially, and legally. This reality must be radically reconsidered in light of the ratification of the United Nations’ Convention on the Rights of Persons with Disabilities (“CRPD”), the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities. There has been, however, virtually no attention paid by criminologists to the potential impact of this Convention on forensic populations. In this paper,

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*** Associate Professor of Criminology and Justice, Loyola University New Orleans. B.A. 1999, Grinnell College; M.C.J. 2007, Loyola University New Orleans; Ph.D. 2011, University of Cambridge.

**** B.A. 2019, Loyola University New Orleans; M.A. 2020, Loyola University New Orleans.
we will focus on a series of core issues—including the lack of attorneys and advocates who represent this population, the lack of scholarly interest in this matter, and the conditions common to many forensic facilities—all through the prism of therapeutic jurisprudence ("TJ"). Additionally, we will explore the reasons why this population is often left behind and why it is essential that criminologists begin to take this issue seriously.

TABLE OF CONTENTS

I. INTRODUCTION ................................................................................ 374
II. FORENSIC FACILITIES ................................................................... 378
III. THE CRPD AND INTERNATIONAL HUMAN RIGHTS LAW ... 380
IV. WHERE IS CRIMINOLOGY ........................................................... 385
V. THE SIGNIFICANCE OF THERAPEUTIC JURISPRUDENCE..... 394
VI. CONCLUSION ................................................................................. 396

I. INTRODUCTION

Persons institutionalized in forensic psychiatric facilities have been hidden from the public view for decades—physically, socially, and legally.¹ The forensic population² also faces multiple forms of discrimination, both

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¹ See generally Maya Sabatello, Where Have the Rights of Forensic Patients Gone?, 109 AM. SOC’Y INT’L L. PROC. 77, 78 (2015) (noting that forensic patients have largely remained invisible throughout the drafting process and aftermath of the CRPD).
² See Michael L. Perlin & Meredith R. Schriver, "You That Hide Behind Walls": The Relationship Between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients, in TORTURE IN HEALTH-CARE SETTINGS: REFLECTIONS ON THE SPECIAL RAPPORTEUR ON TORTURE’S 2013 THEMATIC REPORT 197 (Am. Univ. Ctr. Hum. Rts. & Humanitarian L. 2014) [hereinafter You That Hide Behind Walls] (discussing that forensic populations encompass "mostly those awaiting incompetency-to-stand trial determinations, those found permanently incompetent to stand trial, those who had been acquitted by reason of insanity, and, in some jurisdictions, individuals transferred from correctional facilities").
as a result of their criminal histories\textsuperscript{3} and their mental illnesses.\textsuperscript{4} Moreover, the conditions in such facilities are “even more abysmal than in civil facilities.”\textsuperscript{5} This reality must be radically reconsidered in light of the ratification of the United Nations’ Convention on the Rights of Persons with Disabilities (“CRPD”),\textsuperscript{6} the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities.\textsuperscript{7}

\textsuperscript{3} See generally Michael L. Perlin, “God Said to Abraham/Kill Me a Son”: Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence, 54 AM. CRIM. L. REV. 477, 488–516 (2017) [hereinafter Insanity Defense and the Incompetency Status] (discussing how a determination or evaluation of incompetency to stand trial in no way is an admission or indicia of guilt, but rather, a finding that the person in question cannot consult with counsel or understand the proceedings against him). Nonetheless, most assume the raising of this status (not a defense) is an admission of guilt to the underlying charge. \textit{Id.} at 489. See \textit{generally American Bar Association, Standards for Criminal Justice, Criminal Justice Mental Health Standards} ch. 7, pt. IV (AM. BAR ASS’N 2016) (noting that the doctrine of incompetence to stand trial “has no bearing on guilt or innocence”).

\textsuperscript{4} It is important to note that a significant number of persons in forensic facilities are not mentally ill but are intellectually disabled. See Jill Diane Stinson & Sharon Bradford Robbins, Characteristics of People with Intellectual Disabilities in a Secure U.S. Forensic Hospital, 7 J. MENTAL HEALTH RESCH. INTELL. DISABILITIES 337, 339 (2014). Such patients were found to comprise 12.8% of all patients with forensic involvement, but there has still been minimal focus on the high rates of abuse and neglect experienced by this population. Y. Lunsky, C. Gracey, C. Koegl, E. Bradley, J. Durbin & P. Raina, \textit{The Clinical Profile and Service Needs of Psychiatric Inpatients with Intellectual Disabilities and Forensic Involvement}, 17 PSYCH. CRIME & L. 9, 19–20 (2011); see also W. Glaser & D. Florio, \textit{Beyond Specialist Programmes: A Study of the Needs of Offenders with Intellectual Disability Requiring Psychiatric Attention} 48 J. INTELL. DISABILITY RESCH. 591, 592 (2004).


\textsuperscript{7} See generally Michael L. Perlin & Eva Szeli, \textit{Mental Health Law and Human Rights: Evolution and Contemporary Challenges}, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 80 (Michael Dudley et al. eds., 2012) [hereinafter Contemporary Challenges] (discussing the CRPD and the expansion of human rights in disability law in the international context); Michael L. Perlin, \textit{International Human Rights and Mental Disability Law: When the Silenced Are Heard} (2011) [hereinafter \textit{When the Silenced Are Heard}] (examining the mistreatment of people with mental disabilities globally and identifying universal factors that contaminate mental disability law); Michael L. Perlin & Eva Szeli, \textit{Article 14: Liberty and Security of the Person}, in \textit{The UN Convention on the Rights of Persons with Disabilities: A Commentary} 402 (Ilias Bantekas et al. eds., 2018) (discussing Article 14 of the CRPD, which addresses the fundamental right of liberty and security). See \textit{Insanity Defense and the Incompetency Status, supra} note 3, at 494–504, for a discussion on the potential impact of the General Comment on the CRPD, which requires the abolition of the insanity defense and the incompetency status on this population.
In other scholarly works, two of the co-authors—separately, together, and with others (both lawyers and forensic psychologists)—have begun to consider the impact of this Convention on this population and the changes that must be made in forensic facilities so as to comport with these recent developments in international human rights law. There has been, however, virtually no attention paid by criminologists—or by scholarly criminology journals—to the potential impact of this Convention on forensic populations. In this paper, we will highlight some of the key issues that must be examined in this context, examine them through the lens of therapeutic jurisprudence (“TJ”), and offer some suggestions for future explorations in this area.

As we will note, there is a significant lack of attorneys and advocates available to represent this population. What is especially distressing is the

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lack of attention paid by the “psychiatric survivor” movement to this issue and to the special problems faced by forensic patients who are intellectually disabled. We will briefly explore the reasons why this population is often left behind as new paradigms in mental health and human rights continue to emerge. But again, this does not appear to be a topic of significant interest to criminologists and criminal justice scholars.

We approach the issues in this manner. First, in Part II, we discuss forensic facilities and how forensic patients are often ignored in much of the significant litigation. Then, in Part III, we examine the CRPD and other relevant international human rights law in the context of the focus of this paper. In Part IV, we question why organized criminology has been so silent about the underlying problems. Following that, in Part V, we explain the significance of TJ to the issues under discussion. Finally, in Part VI, we conclude with some suggestions as to how the issues and problems we raise can be remediated.

Our title comes from this couplet in a relatively unknown (but nonetheless powerful) song of Bob Dylan’s, Caribbean Wind:

And them distant ships of liberty on them iron waves so bold and free/
Bringing everything that’s near to me nearer to the fire.11

Critics have characterized the image of “ships” in Dylan’s writings as “[o]ne of Dylan’s prophesies, optimistic and vengeful in heralding the day when evil will be purged.”12 The use of the word “wind” in the title is seen as “the metaphor for change.”13 We believe that the conditions in many (perhaps most) forensic facilities around the world are “evil,” and we believe that change is needed. We thus incorporate this line into our title in the hopes that new policies—quoting the lyric, “bold and free”—will soon come into place.

10 See infra note 74 and accompanying text.
11 Dylan has sung it in concert only once, some forty years ago. See Caribbean Wind, BOBDYLAN.COM, https://www.bobdylan.com/songs/caribbean-wind/ [https://perma.cc/DA5U-LNES].
II. FORENSIC FACILITIES

Persons institutionalized in psychiatric institutions and facilities for persons with intellectual disabilities have always been hidden from view. These facilities were often constructed far from major urban centers, making the availability of transportation to such institutions limited. Those who were locked up were, to the public, faceless and often seen as less than human. Although there were sporadic exposés in the nineteenth century, and then later in the mid-twentieth century, it was not until the early 1970s (when the civil rights revolution reached psychiatric hospitals and facilities for persons with intellectual disabilities) that there was any true public awareness of the conditions in such facilities.

A series of court cases brought by young public interest lawyers in both the United States and Western Europe shone a harsh light on the brutal and inhuman conditions in such facilities in the early and mid-1970s. One expert referred to the Pennhurst State School, in suburban Philadelphia, as “a Dachau, without ovens.” These cases led to the predictable empowerment of blue-ribbon commissions, the issuance of lengthy reports excoriating states for the shameful conditions in which individuals were treated, and eventually, albeit tardily, the legislative passage of so-called “Patients’ Bills of Rights.”

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16 See Michael L. Perlin & Heather Ellis Cucolo, 1 Mental Disability Law: Civil and Criminal § 3-2.2 (2021) (discussing reform work of Dorothea Dix, E.P.W. Packard, and Albert Deutsch).
substantive and procedural protection for those in danger of being deprived of their liberty and for those who had been so deprived.\textsuperscript{21}

A similar progression was occurring in Western Europe at this time and community-based treatment was scrutinized and discussed in government policies known as “Better Services for the Mentally Ill” and “Community Care with Special Reference to Mentally III and Mentally Handicapped [P]eople.”\textsuperscript{22} Perhaps as a by-product of all of this, those individuals who had been hidden and whose voices had been silenced began to raise their voices to protest the dehumanization of the conditions in which they had been confined.\textsuperscript{23}

Much of the case law ignores forensic patients entirely.\textsuperscript{24} By and large (although not exclusively\textsuperscript{25}), the facilities subject to this litigation and the concomitant press scrutiny\textsuperscript{26} mostly housed patients who had never been charged with or tried on criminal charges. Interestingly and ironically, this

\begin{itemize}
\item \textsuperscript{21}See, e.g., Michael L. Perlin, “Everybody Is Making Love/Or Else Expecting Rain”: Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia, 83 WASH. L. REV. 481, 487 (2008) [hereinafter Sexual Autonomy Rights of Persons Institutionalized].
\item \textsuperscript{22}Helen Killaspy, From the Asylum to Community Care: Learning from Experience, 79 BRITISH MED. BULL. 245, 249 (2007).
\item \textsuperscript{23}The involvement of such groups in test case litigation—exercising the right of self-determination in an effort to control their own destinies to the greatest extent possible—is a major development that cannot be overlooked by any participant in subsequent mental disability litigation. See, e.g., JUDI CHAMBERLIN, ON OUR OWN: PATIENT-CONTROLLED ALTERNATIVES TO THE MENTAL HEALTH SYSTEM (1978) (discussing how advocates can create more patient-controlled mental health facilities as an alternative to traditional mental health hospitals, where patients are often alienated, ignored, or overmedicated); Neal Milner, The Right to Refuse Treatment: Four Case Studies of Legal Mobilization, 21 L. & SOC’Y REV. 447 (1987) (discussing impact of ex-patient groups on course of right to refuse treatment litigation); Judi Chamberlin & Joseph A. Rogers, Planning a Community-Based Mental Health System: Perspective of Service Recipients, 45 AM. PSYCH. 1241, 1241 (1990); Symposium, Challenging the Therapeutic State: Critical Perspectives of Psychiatry and the Mental Health System, 11 J. MIND & BEHAV. 247 (1990); Peter Margulies, The Cognitive Politics of Professional Conflict: Law Reform, Mental Health Treatment Technology, and Citizen Self-Governance, 5 HARV. J.L. & TECH. 25, 56-57 n.132 (1992). See Symposium, Challenging the Therapeutic State, Part Two: Further Disquisitions on the Mental Health System, 15 J. MIND & BEHAV. 1 (1994) (surveying on the various kinds of historical challenges faced by people with intellectual disabilities and their impact on such population); Jennifer Honig & Susan Fendell, Meeting the Needs of Female Trauma Survivors: The Effectiveness of the Massachusetts Mental Health Managed Care System, 15 BERKELEY WOMEN’S L.J. 161, 184–85 (2000).
\item \textsuperscript{24}See Sexual Autonomy Rights of Persons Institutionalized, supra note 21, at 488.
\item \textsuperscript{25}See, e.g., Davis v. Watkins, 384 F. Supp. 1196, 1201–02 (N.D. Ohio 1974); see also Sexual Autonomy Rights of Persons Institutionalized, supra note 21, at 488 (“Of the important [first generation right-to-treatment institutional conditions cases], forensic patients were part of the plaintiff class only in the Ohio case of Davis v. Watkins.”). For a full discussion of Davis v. Watkins, see PERLIN & CUCLO, supra note 16, § 7-3.2.
\item \textsuperscript{26}For the role of the press, see Paul Davis, Wyatt v. Stickney: Did We Get It Right This Time?, 35 L. & PSYCH. REV. 143, 153 (2011).\
\end{itemize}
fact is discordant with the false “ordinary common sense”27 that “[m]ost mentally ill individuals are dangerous and frightening [and] are invariably more dangerous than non-mentally ill persons.”28 Even in the hidden world of those institutionalized because of psychiatric disability (or alleged disability), forensic patients—mostly those awaiting incompetency-to-stand trial determinations, those found permanently incompetent to stand trial, those who had been acquitted by reason of insanity, and in some jurisdictions, individuals transferred from correctional facilities—remain the most hidden.

III. THE CRPD AND INTERNATIONAL HUMAN RIGHTS LAW

This reality must be radically reconsidered in light of the ratification of the United Nations’ Convention on the Rights of Persons with Disabilities,29 “regarded as having finally empowered the ‘world’s largest minority’ to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection.”30

27 See Heather Ellis Cucolo & Michael L. Perlin, Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 38 (2012) (“‘[O]rdinary common sense’... is self-referential and non-reflective (‘I see it that way, therefore everyone sees it that way; I see it that way, therefore that’s the way it is’)”).


29 See generally WHEN THE SILENCED ARE HEARD, supra note 7.

The CRPD is the most revolutionary international human rights document ever created that applies to persons with disabilities. It furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in almost every aspect of life. It firmly endorses a social model of disability and reconceptualizes mental health rights as disability rights—a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law. “The Convention . . . sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities.” It provides a framework for ensuring that mental health laws “fully recognise the rights of those with mental illnesses.” There is no question that it has “ushered in a new era of disability rights policy.” This is epitomized through the Convention calling for the “respect for [the] inherent dignity” of people with mental illness and to practice “non-discrimination.” Subsequent Articles declare freedom from “arbitrary or unlawful interference” with privacy, “[f]reedom from torture or cruel, inhuman or degrading treatment or punishment,” “[f]reedom from exploitation, violence and abuse,” and a right to protection of the
“integrity of the person.”42 The CRPD is unique because it is the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities.43 It not only clarifies that States should not discriminate against persons with disabilities, but also explicitly sets out the many steps that States must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.44

As noted above, the Convention was signed by President Obama but not ratified by the Senate.45 Notwithstanding this, the Convention has been cited with approval by multiple U.S. courts on the theory that “international adoption of the protection of the rights of persons with intellectual and other disabilities, including the right to periodic review of burdens on individual liberty, is entitled to ‘persuasive weight’ in interpreting our own laws and constitutional protections.”46

42 Id. art. 17.
45 You Might Have Drugs at Your Command, supra note 30, at 385; see also Kantner, supra note 30, at 330, 342.
The Convention must be read hand-in-glove with the United Nations Convention against Torture ("CAT"). Together, these documents make it more likely—or should make it more likely—that, for the first time, attention will be paid to the conditions of confinement of this population worldwide, how those conditions regularly violate international human rights law, and how those who oversee these institutions do so with impunity.

The CAT defines the term torture to mean
any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on people for such purposes as obtaining from them or a third person information or a confession, punishing them for an act they have or a third person has committed or is suspected of having committed, or intimidating or coercing them or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention Against Torture was intended to “strengthen the existing prohibition[s]” on torture in international law. It must be noted, however, that such torture must be “severe” and “requires a specific intent to cause severe pain and suffering.”

Janet Lord has written eloquently about the “anti-torture” framework of the CRPD, concluding:
The adoption of the CRPD clearly constitutes an important development in the anti-torture framework under international human rights law. Its principal contribution

48 Id. art. 1.
is to apply the torture prohibition within a disability context, consistent with core principles of the CRPD including dignity, non-discrimination, autonomy, and independence. It also contributes to the framework by introducing explicitly, for the first time in an international human rights treaty, the requirement that reasonable accommodations be provided and that the failure to do so results in a finding of discrimination. . . . These principles add content to the overall anti-torture framework and should thus find ready application as a guide to regional and international regimes applying the prohibition against torture and other cruel, inhuman, and degrading treatment or punishment.52

However, there has been little follow-up literature on this connection, and that gap is truly problematic if we are ever to fully contextualize the two Conventions within the context of the treatment of persons with disabilities, especially those institutionalized because of mental disabilities. With another co-author, I have previously written about this issue, focusing on the relationship between the CRPD and the CAT in questions related to the treatment of institutionalized forensic patients (those admitted to psychiatric institutions following involvement in the criminal justice system), highlighting some of the key issues that must be examined in this context, and examining the issues in question through the lens of TJ.53 It is important to note that law professors and public interest lawyers54 have considered some of the underlying issues as well.55 But criminologists have been stunningly silent about these issues.

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52 Id. at 78–79.
53 See You That Hide Behind Walls, supra note 2, at 201–02.
IV. WHERE IS CRIMINOLOGY?

In order to answer this question, we performed a search on the two most comprehensive databases of articles in criminology, Criminal Justice Abstracts and EBSCOHost, both of which contain articles published in the last forty years. We searched the terms “disability and human rights,” “mental disabilities and human rights,” “mental disability and human rights,” and “mental illness and human rights.” We then cross-referenced our findings against the list of criminology and criminal justice journals available on the American Society of Criminology website.56

We found a total of just six articles as a result of our searches. Three of these, those by Brookbanks,57 Chan,58 and Weber, Fishwick, and Marmo59 focus on people with mental disabilities and human rights in New Zealand, Australia, and North America. The other three (those by Arrigo and Bullock,60 Nolasco and Vaughn,61 and Shalev62) focus on the use of solitary confinement in institutional corrections in the United States.63 But

58 See generally Jeffrey Chan, Challenges to Realizing the Convention on the Rights of Persons with Disabilities (CRPD) in Australia for People with Intellectual Disability and Behaviours of Concern, 23 PSYCHIATRY, PSYCH. & L. 1 (2015) (exploring the challenges that limit the full realization of rights through the CRPD).
62 See generally Sharon Shalev, Solitary Confinement and Supermax Prisons: A Human Rights and Ethical Analysis, 11 J. FORENSIC PSYCH. PRAC. 151 (2011) (analyzing how prolonged solitary confinement and additional deprivations in supermax prisons measure up against legal protections afforded to those deprived of their liberty).
63 Probably the most well-known scholar on the use of solitary confinement and its effects is psychologist Craig Haney, who has written extensively and has testified before Congress about the deleterious effects of solitary confinement on people with mental illness in correctional
this was all we found. Wallace has noted a similar dearth of scholarship on people with disabilities in the criminological literature, despite the thirty years since the passage of the Americans with Disabilities Act ("ADA").

Our findings are frankly perplexing and troubling, especially because this lack of attention and concern stands in stark contrast to criminology's important focus on both violations of international criminal law and state-sanctioned crime. We are heartened that in the Newsletter of the European Society of Criminology ("ESC"), Sonja Snacken called attention to "the complete absence of human rights" in the analyses of western penology on the part of leading scholars during her acceptance speech for the ESC European Criminology Award. She urged that criminologists should base their work on "commonly shared basic values such as social equality, democracy and human rights." But it is depressing that the citations that she offers to this laudable principle are solely her own work and the work of her and a colleague.


Danielle Wallace, Criminology, Criminal Justice, and 30 Years of the Americans with Disabilities Act: Where Is the Research from Our Field?, 46 Criminologist 1, 4 (2021) (noting that although persons with disabilities are far more likely to be victimized than persons without such disabilities and are over-represented in the jail and prison systems, the criminology literature has ignored key questions such as how such persons came to be involved in the system, how they experience incarceration and detention, and the consequences of system involvement).


Id. at 12.

There are six core issues that must be “on the table” if the scope of the underlying problems is to be understood:

a. Although there is a robust literature on the CRPD and on the CAT, there is virtually no mention of the plight of forensic patients. So, even within the world of those who focus broadly on these human rights issues, this population has remained invisible.

b. Conditions at forensic facilities around the world continue to shock the conscience.

c. Even when regional courts and commissions have found international human rights violations in cases involving forensic patients (for example, Victor Rosario Congo v. Ecuador), the discussion of these cases largely ignores the plaintiffs’ statuses as forensic patients.

d. There are few lawyers and fewer “mental disability advocates” providing legal and advocacy services to this population.

See Insanity Defense and the Incompetency Status, supra note 3, at 477 (“The conditions of treatment of forensic patients—their institutionalization in psychiatric facilities, their confinement in such facilities, and their possible pathways out—has always been stunningly under-considered, not just in academic literature and case law, but also in the discussions and negotiations that led to the final draft of the Convention on the Rights of Persons with Disabilities[.]”).

See Sabatello, supra note 1, at 78 (“[F]orensic patients—i.e., individuals with psychiatric conditions who committed a crime [sic]—have remained largely invisible throughout the drafting process, and its aftermath.”).

For an example of such a forensic case, see, e.g., Scott v. Plante, 641 F.2d 117 (3d Cir. 1981), vacated, 458 U.S. 1101 (1982).


e. There is little mention in the survivor movement literature about the specific plight of forensic patients.  

f. Forensic patients in facilities for persons with intellectual disabilities are particularly absent from the discourse.

Each of these issues— it seems to us— screams out for consideration by criminologists and criminal justice scholars. Each is of immeasurable “real world” importance. We know, by way of parallel examples, that criminology becomes more and more important in the study of terrorism, as well as the study of environmental (also called green) crimes such as air and water pollution, deforestation, and crimes against animals, and that criminology has been identified as a potential means of dealing with state criminality. But there has been virtually no attention paid to any of these issues, all of which, we believe, should be of significant concern to criminologists and to lawyers who work with criminologists.

We have found only one article that suggests a connection between critical criminology and critical disability rights studies, and that considers receive “less humane services than do civil patients”); see also Michael L. Perlin, “For the Misdemeanor Outlaw”: The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities, 52 ALA. L. REV. 193, 195 (2000) [hereinafter For the Misdemeanor Outlaw] (discussing that patients’ rights bars and mental disability advocates “historically have imposed a strict orthodoxy of analysis geared to separating out ‘criminal’ mental health law from ‘civil’ mental health law”).


the significance of the CRPD.\textsuperscript{79} That article appropriately notes that persons with disabilities in prison not only have the same human rights afforded to all, but also have particular rights as recognized in an array of human rights instruments, including Articles 12, 13, 14 and 15 of the CRPD. Additionally, the article underscores that “these umbrella protections, however, appear to have had limited impact on the increasing over-representation of people with [psychosocial and intellectual disabilities] in the criminal justice system.”\textsuperscript{80} But, the reality is this: these issues are simply off the table for criminology.\textsuperscript{81}

Why is this? In an earlier paper, two co-authors speculated:

[The] extra level of social isolation [faced by forensic patients] was generally just fine with most of those who had been involved in the patients’ rights revolution, which has restructured mental health care around the world. It was fine to the advocacy groups that came forward at that time because the existence of a forensic “world” could be used as evidence that there was a causal relationship between mental illness (or intellectual disability) and “dangerousness.” It was fine to the lawyers who brought the bulk of the first generation of public interest cases since one of the significant underpinnings of the initial right to liberty or least restrictive alternative civil rights suits was that the plaintiff had never been “alleged to have committed any crime.” It was fine to the state hospital system because if a forensic population was released or deinstitutionalized, there would be a predictable public outcry. And it was fine to prosecutors and police officials since it insured that this population would remain locked up indefinitely. As a result of all of this, the status quo has remained for about forty years, and the changes in


\textsuperscript{80} \textit{id.} at 30.

\textsuperscript{81} To this date (March 19, 2022), the Dowse-Baldry-Snoyman article, \textit{supra} note 79, has not been cited in any U.S.-based law review (or at least, any available on Westlaw or Lexis, the two major databases for law reviews) although it was cited in one Australian law journal (co-authored by one of its authors). See Linda Steele, Leanne Dowse & Julian Trofimovs, Who Is Diverted?: Moving Beyond Diagnosed Impairment Towards a Social and Political Analysis of Diversion, 38 SYDNEY L. REV. 179, 185 (2016).
conditions for civil patients have had very little impact on those in forensic facilities.\(^\text{82}\)

If we were right—and in the eight years since this book chapter was published there has been no pushback to these positions at all\(^\text{83}\)—it is yet one more reason for criminologists to involve themselves in this area. This lack of involvement is even more disturbing in light of Mary Barnao and Tony Ward’s findings that “there is a paucity of empirical research to guide the rehabilitation of [mentally disordered offenders] in a forensic mental health context and the majority of published literature has focused on the application and evaluation of specific interventions rather than on the development of overarching models of care.”\(^\text{84}\) Again, this conclusion screams out to criminology and criminologists for greater attention to be paid to these issues.

We know that working with criminologists on these issues and embracing the differences in the disciplines and approaches to these issues will improve both scholarship and the representation of the population on which we focus in this article. A greater understanding of the human rights implications of confining individuals in forensic facilities is key in moving legal education and the law forward. However, we also want to stress the potential benefits we see for criminology, criminologists, and criminology scholars who may be wondering how this area of study can help their disciplines grow and expand.

At its most basic level, criminology is a scientific study of the nature, extent, management, causes, control, consequences, and prevention of criminal behavior, both on the individual and social levels.\(^\text{85}\) Criminologists often have more of a quantitative focus in their work than many legal scholars\(^\text{86}\) but may not have access to as much real-time information about

\(^\text{82}\) See You That Hide Behind Walls, supra note 2, at 197–98. See generally A Change Is Gonna Come, supra note 5. On how the insanity defense became subject to additional assaults from the civil-libertarian left and the ex-patient “psychiatric survivor” movements, see Michael L. Perlin, Deborah A. Dorfman & Naomi M. Weinstein, “On Desolation Row”: The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What It Means to All of Us, 24 TEX. J. CIV. LIBERTIES & CIV. RTS. 59, 61, 61 nn. 8–9 (2018).

\(^\text{83}\) But see Carole J. Petersen, Addressing Violations of Human Rights in Forensic Psychiatric Institutions: Philosophical and Strategic Debates, 109 AM. SOC’Y INT’L L. PROC. 80, 80 (2015), (disagreeing “with the contention that the disability rights movement has also ignored this population”).

\(^\text{84}\) Mary Barnao & Tony Ward, Sailing Uncharted Seas Without a Compass: A Review of Interventions in Forensic Mental Health, 22 AGGRESSION & VIOLENT BEHAV. 77, 84 (2015).


what is happening “on the ground.” This is where we think a partnership between the two disciplines could be mutually beneficial. Attorneys are consistently in court discussing these issues, trying to convince jurors of mitigating evidence, (by way of example, of the weight and significance of mitigating evidence in death penalty cases), and on the front lines of policy and legislative reforms on a broad range of law reform issues related to both international human rights law and conditions in forensic facilities. Through relationships with legal practitioners, we believe criminology as a discipline can be better deployed to examine these issues from a social science perspective, and therefore provide a more comprehensive understanding of these issues, and of what to do about them.

Using this topic as an example, criminology’s interest in the management, consequences and control of criminal behavior can be

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87 For a discussion on how therapeutic jurisprudence—see infra Part V—has begun to forge such a partnership, see David B. Wexler, Two Decades of Therapeutic Jurisprudence, 24 TOURo L. REV. 17, 25–27 (2008); see also Tali Gal & David B. Wexler, Synergizing Therapeutic Jurisprudence and Positive Criminology, in POSITIVE CRIMINOLOGY 85, 85–97 (Natti Ronel & Dana Segev eds., 2015). One of the criminologist co-authors and one of the legal scholar co-authors of this article have just co-edited a book looking at some of these issues from both legal and criminological perspectives. See JUSTICE OUTSOURCED: THE THERAPEUTIC JURISPRUDENCE IMPLICATIONS OF JUDICIAL DECISION-MAKING BY NON-JUDICIAL OFFICERS (Michael L. Perlin & Kelly Frailing, eds.) (forthcoming 2022) (on file with authors).


informed by the international human rights movement, especially in the cases of individuals who are already at a disadvantage in the legal system due to bias against mental illness. One of the co-authors—in an article with a different author—has concluded that the CRPD can serve as a “vehicle that will finally extinguish the toxic stench of sanism that permeates all levels of society.” The human rights implications of individuals confined in a forensic unit can be used by criminology researchers to examine the myriad consequences that accompany such conditions. We believe that research like this would strengthen the field and help to expand it into greater opportunities for cross-disciplinary collaboration—something we think is critical between the two disciplines.

Additionally, legal scholars are working on ideas and theories that could be integrated into current criminological research, to strengthen the scholarship in both disciplines. We believe that TJ is a perfect example

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90 There has been some interest in this relationship in the context of the detention of suspected terrorists. See Douglas Cassel, Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law, 98 J. CRIM. L. & CRIMINOLOGY 811, 845–49 (2008) (arguing that international human rights law and international humanitarian law prohibit “incommunicado” detention for periods lasting “more than a few days”).

91 For more discussion on this bias, to which scholars refer to as “sanism,” see Michael L. Perlin & Alison J. Lynch, “Mr. Bad Example”: Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root out Sanism in the Representation of Persons with Mental Disabilities, 16 Wyo. L. Rev. 299, 306 (2016) [hereinafter Mr. Bad Example]:

Sanism is an “irrational prejudice of the same quality and character as other irrational prejudices that cause, and are reflected in, prevailing social attitudes such as racism, sexism, homophobia, and ethnic bigotry . . . .” Sanism reflects discrimination on the basis of one’s mental state or condition. Sanism—“the pervasive stigma that befalls persons with mental disabilities”—permeates the legal process both in cases in which mental capacity is a central issue, and those in which such capacity is a collateral question. It affects all participants in the mental disability law system, including litigants, fact finders, counsel, and expert and lay witnesses, and its corrosive effects have warped all aspects of mental disability law, involuntary civil commitment law, anti-discrimination law institutional law, tort law, and all aspects of the criminal process. Sanism also reflects what civil rights lawyer Florynce Kennedy has characterized as the “pathology of oppression.”


92 Voices in the Night, supra note 46, at 879.

of a way in which a legal concept dealing with the individual person, the client, can be used to strengthen criminological research. TJ has the benefit of looking at larger groups and coming to more data-based conclusions. TJ will also allow criminologists to understand why these issues must be tackled and why they can be made even stronger with an integration of our disciplines.94

Consider one example, where observations that have been made involving post-conviction status hearings in which program participants and the judge interact. Particularly in problem solving courts,95 such as drug or mental health courts, and in some specialized probation programs, these interactions are a key opportunity for TJ to manifest itself.96 It can be clearly observed, for example, in the opportunity participants have to make their voices heard in the proceedings and in the praise the judge offers for acute achievements (for example, securing a new job) as well as for patterns of success (for example, a prolonged period of sobriety).97

94 See infra Part V.
V. THE SIGNIFICANCE OF THERAPEUTIC JURISPRUDENCE

TJ “asks us to look at law as it actually impacts people’s lives.” It focuses on the law’s influence on emotional and psychological well-being, forcing us to look at the “real world” implications of the failure of criminology to confront international human rights as it applies to persons institutionalized because of mental disability.

Importantly, the ultimate aim of TJ is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to “enhance their therapeutic potential, while not subordinating due process principles.” There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: the law’s use of “mental health information to improve therapeutic functioning [cannot] impinge[e] upon justice concerns.” Again, it is vital to keep in mind that “an inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”

In its aim to use the law to empower

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individuals, enhance rights, and promote well-being. TJ has been described as “a sea-change in ethical thinking about the role of law... a movement towards a more distinctly relational approach to the practice of law... which emphasise[s] psychological wellness over adversarial triumphalism.” That is, TJ supports an ethic of care.

One of the central principles of TJ is a commitment to dignity. Professor Amy Ronner describes the “three Vs” as “voice, validation, and voluntary participation,” arguing:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigants [sic] story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own

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TJ principles frequently converge with many of the principles underlying international human rights protections for those with mental disabilities, such as “the protection of liberty against arbitrary deprivation and a commitment to procedural fairness, and a need for robust counsel.” As previously noted, the CRPD declares a right to “[f]reedom from . . . degrading treatment or punishment” and a “[r]espect for inherent dignity.” It promotes “awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities.” An understanding of dignity is central to an understanding of the intersection between international human rights and mental disability law. TJ can provide insights on how international human rights principles should be applied “to achieve therapeutic aims and avoid antitherapeutic effects.” In the subsequent section, we discuss how this can best be done in this context.

VI. CONCLUSION

In an earlier article, one of the co-authors posed this question: “to what extent can international human rights law reach out to therapeutic jurisprudence to best insure that these principles written about by Professor Ronner—the principles of voluntariness, voice and validation—be fulfilled in matters involving residents of forensic institutions?” There, he noted that there has been some important work done on the relationship of TJ to the application of international human rights principles to prisoners and detainees with a mental illness. Much of the work was a response to the reality that the conditions of prison facilities and forensic facilities around

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109 Voices in the Night, supra note 46, at 903.
110 CRPD, supra note 6, art. 15.
111 Id. art. 3(1).
112 Id. art. 8(1)(a).
115 You That Hide Behind Walls, supra note 2, at 215.
the world are textbook examples of anti-therapeutic conditions. For example, Astrid Birgden argues forcefully that “[a]pplying therapeutic jurisprudence can assist forensic psychologists in actively addressing human rights in general, as well as prisoners and detainees with mental disabilities in particular.” But this literature applies to correctional facilities, not forensic facilities, and it was all written by forensic psychologists and lawyers.

Consistent with a TJ orientation, some criminologists and some legal scholars have recognized the value of examining participant perspectives in specialty courts such as drug, mental health, and reentry courts. Such information is valuable because it helps to contextualize whether these courts and programs work, and if so, for whom and why. Others have focused on how TJ can manifest in probation. But very few criminologists have focused on the theoretical importance or potential manifestations of TJ in institutional corrections, although some legal scholars and some criminologists have recognized its absence in that context.

Conditions in forensic facilities across the world “shock the conscience,” and, in some instances, are so bereft of humanity that they


117 Astrid Birgden, Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required, 78 REVISTA JURIDICA U.P.R. 43, 56 (2009); see also Home in the Valley, supra note 8, at 257; Tolling for the Luckless, supra note 8.


120 See Deborah A. Dorfman, Doing Time in “The Devil’s Chair:” Evaluating Nonjudicial Administrative Decisions to Isolate and Restrain Prisoners and Detainees with Mental Health Disabilities in Jails and Prisons, 64 AM. BEHAV. SCIENTIST 1702, 1705 (2020).

121 Talia Roitberg Harmon, Michael Cassidy & Richelle Kioch, Examination of Decision-Making and Botched Lethal Injection Executions in Texas, 64 AM. BEHAV. SCIENTIST 1715 (2020).
challenge the notion that we are a civilized society. As one of the authors has written, “these conscience-shocking conditions scream[122] out for an in-depth TJ analysis, to demonstrate their destructiveness and their negative impact on the mental health of those unlucky enough to be housed in such facilities.” Elsewhere, one of the co-authors has written, “The CRPD is a document that resonates with TJ values.” Although there has been some interest in the overlap between TJ and the CRPD, this interest has not extended to the specific problems raised by forensic institutions. And, sadly, there has been little demonstration of interest by criminology scholars.

Ironically, the link between TJ and criminology is, or at least, should be clear. As one of the founders of TJ wrote recently, “TJ scholarship looks to the behavioral sciences, and notably to criminology, for guidance.” But, to the best of our knowledge, only a handful of criminologists write regularly and consciously in the vein of TJ: Tali Gal, the team of Kimberley Kaiser and Kristy Holtfreter, Talia Harmon, David Patton, and

122 See, e.g., Comparative Mental Disability Law, supra note 73, at 343, 349; Michael L. Perlin, Understanding the Intersection Between International Human Rights and Mental Disability Law: The Role of Dignity, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 191 (Bruce Arrigo & Heather Bersot eds., 2013).
124 Promoting Social Change in Asia, supra note 43, at 36.
126 But see The Ladder of the Law, supra note 123, at 542 (calling for, as part of a new TJ research agenda, the study of “the TJ implications of instituting reform of forensic facilities”).
127 Getting and Giving, supra note 93, at 908; see also Georgia Zara, Therapeutic Jurisprudence As an Integrative Approach to Understanding the Socio-Psychological Reality of Young Offenders, 71 UNIV. CIN. L. REV. 127, 128 (2002) (“Within a multidisciplinary therapeutic jurisprudence (TJ) perspective, the new mode of criminological research brings together clinical, biological, medical, psychological and social perspectives.”).
128 See, e.g., Hadar Dancig-Rosenberg & Tali Gal, Restorative Criminal Justice, 34 CARDOZO L. REV. 2313 (2013) [hereinafter Restorative Criminal Justice]. One of the co-authors has noted that at a major criminology scholarly conference in 2013, besides him and a co-author, Professor Gal was the only other person to do a TJ-based presentation. Note that Turbulent Space, supra note 101, was initially presented at that conference. See also Michael L. Perlin, “There’s A Dying Voice Within Me Reaching out Somewhere:” How TJ Can Bring Voice to the Teaching of Mental Disability Law and Criminal Law, 3 SUFFOLK UNIV. L. REV. ONLINE 37, 41–42 (2015).
Professor David Wexler, one of the founders of the school of TJ, has recently argued that TJ is remarkably (but not at all surprisingly) consistent with the school of “Positive Criminology,” which is “oriented to human strengths, resilience, and positive encounters that can assist individuals in abstaining from crime and deviant behaviors.” As Wexler and Tali Gal, an Israeli criminologist and lawyer, explain: positive criminology “goes against the focus of much of the research which highlights ‘goodness’ in relation to normative people and ‘badness’ in relation to law-breakers, offering an alternative research agenda that focuses on goodness in the lives of offenders, victims, and those at risk of become [sic] either.”

There are a few other inquiries to consider. Professors Kaiser and Holtfreter have argued that specialized court programs must incorporate TJ and procedural justice concepts. Professor Marinos has carefully analyzed the differences between juvenile mental health courts and traditional juvenile “guilty plea” courts, concluding that it is more likely in a well-functioning juvenile mental health court that those before the court

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130 Getting and Giving, supra note 93, at 908.

131 Gal & Wexler, supra note 87, at 87. Australian forensic psychologist Tony Ward has created the “good lives model.” See Tony Ward, Good Lives and the Rehabilitation of Offenders Promises and Problems, 7 AGGRESSION & VIOLENT BEHAV. 513 (2002). Based on therapeutic principles and on positive psychology, the “good lives model” is “a strength-based approach to supporting offenders in meeting their human needs.” Astrid Birgden, Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required, 78 REVISTA JURIDICA UPR 43, 49 (2009). See generally Mr. Bad Example, supra note 91, at 322 (“[Positive psychology] emphasizes positive experiences and traits, and studies how people flourish, focusing on an individual’s well-being and the ‘good life.’”)

132 Kaiser & Holtfreter, supra note 129, at 58.
will be consulted about decisions made about them. One of the co-authors of this article and her colleagues have recently examined the ways TJ can manifest in a HOPE-like probation program, highlighting both interactions with the judge and with probation officers as crucial in participant perceptions of procedural justice. Professor Patton has recently written about how an “emotionally intelligent” criminal justice system must incorporate TJ principles. But other than those professors, few criminologists have spoken out on these topics. We believe it is time to do so. The issues we are raising here are perfect for criminologists to explore.

We used a lyric from Bob Dylan’s song, Caribbean Wind, as the start of our paper title. We believed that just as ships of liberty (in Dylan’s vision) needed to sail on waves “bold and free,” so do criminology scholars have to chart out new visions and new territory of (intellectual) exploration so that they can be “bold and free” in their discoveries. And as a result, the facilities about which we speak will finally, in the words of a music critic discussing this lyric in this song, be “purged of evil.”

133 Marinos, supra note 129.
134 Swift and Certain Probation, supra note 97. HOPE is an acronym for “Hawaii’s Opportunity Probation with Enforcement,” and it involves swift, certain, and proportional responses to criminal behavior in an intensely supervised probation population. See, e.g., Bartels, supra note 119, at 26; Oleson, supra note 119 (summarizing achievements of Hawaii’s HOPE program and describing its adoption around the world); Zachary Hamilton, Christopher M. Campbell, Jacqueline van Wormer, Alex Kigerl & Brianne Posey, Impact of Swift and Certain Sanctions: Evaluation of Washington State’s Policy for Offenders on Community Supervision, 15 CRIMINOLOGY & PUB. POL’Y 1009 (2016) (concluding that Washington State’s swift-and-certain (SAC) policy, which was intended to expand upon the HOPE program, provided noteworthy positive effects and no appreciable negative impacts on public safety).
135 Patton, supra note 129, at 6.